

ID# 14652  
mJ

RQ-306



Office of the

# SECRETARY OF STATE

John Hannah, Jr.  
SECRETARY OF STATE

January 9, 1992

JAN 14 92

EXECUTIVE DIVISION  
P.O. Box 12697  
Austin, Texas 78711-2697  
(512) 463-5701

ELECTIONS DIVISION  
P.O. Box 12060  
Austin, Texas 78711-2060  
(512) 463-5650

DATA SERVICES  
DIVISION  
P.O. Box 12887  
Austin, Texas 78711-2887  
(512) 463-5609

SUPPORT SERVICES  
DIVISION  
Financial Management  
O. Box 12887  
Austin, Texas 78711-2887  
(512) 463-5600

Staff Services  
P.O. Box 12887  
Austin, Texas 78711-12887  
(512) 463-5600

STATUTORY FILINGS  
DIVISION  
Corporations  
P.O. Box 13697  
Austin, Texas 78711-3697  
(512) 463-5555

Statutory Documents  
P.O. Box 12887  
Austin, Texas 78711-12887  
(512) 463-5654

Texas Register  
P.O. Box 13824  
Austin, Texas 78711-13824  
(512) 463-5561

Uniform Commercial Code  
P.O. Box 13193  
Austin, Texas 78711-3193  
(512) 475-2705

The Honorable Dan Morales  
Attorney General  
Supreme Court Building  
Post Office Box 12548  
Austin, Texas 78711

RE: Opinion request concerning whether pursuant to the Texas Health Spa Act, there are two different security requirements existing for health spas.

Dear General Morales:

Pursuant to Tex. Gov't Code. Ann. § 402.042 (Vernon 1990), the Office of the Secretary of State requests your opinion regarding whether a health spa opened prior to September 1, 1989, is subject to a lower security deposit than one opened after such date.

The primary issue presented for your consideration is whether Section 3.17(d) of Acts 1989, 71st Legislature, chapter 1039 [enclosure 1] amended section 10 of the Texas Health Spa Act, Tex. Rev. Civ. Stat. Ann. art. 5221i, to eliminate the security deposit exemption (commonly referred to as the "grandfather clause") described in Section 10(d). The referenced section 3.17(d) deleted all of the section 10(d) language existing prior to September 1, 1989.

Although it appears there is no longer an exemption from providing a security requirement, Article 6 of the above-mentioned chapter 1039 [enclosure 2], entitled Transition and Miscellaneous Provisions, contains a section 6.09 that appears to establish two different classes of security deposits. Section 6.09(b) states:

A health spa in operation before September 1, 1989, and any additional location opened by that health spa on or after September 1, 1989, is subject to the security requirements in effect on August 31, 1989, and the former law is continued in effect for that purpose.

The Honorable Dan Morales

Page 2

January 9, 1992

Prior to September 1, 1989, the amount of security required was defined in sections 10(b)&(c) of the Health Spa Act as:

(b) The amount of the security required under Subsection (a) of this section is 20 percent of the total value of the prepayments received by the health spa. However, the amount of the security may not be less than \$20,000 or more than \$50,000.

(c) The health spa shall maintain the security in the amount provided in Subsection (b) of this section in effect for two years after the date the security is filed with the department [now the secretary of state]. Thereafter, the health spa shall continuously maintain security in the amount of \$5,000.

Prior to September 1, 1989, the Health Spa Act was administered by the Department of Labor and Standards (now known as the Department of Licensing and Regulation). On September 1, 1989, this responsibility was transferred to the Office of the Secretary of State along with all the records pertaining to health spas that were in the custody of the Department of Labor and Standards.

The secretary of state has been attempting to determine the amount of security that is necessary for those health spas which currently have no security filed. It is the position of this office that there are two classes of security that exist.

(1) One class for health spas that are opened on or after September 1, 1989. That amount is \$20,000 and does not reduce in amount as long as the spa is in operation.

(2) A second class pertains to spas opened prior to September 1, 1989. That amount is 20% of the total value of the prepayments received by the health spa. However, the amount of the security may not be less than \$20,000 or more than \$50,000; thereafter, the security shall reduce and remain at \$5,000.

Further, as to class (2) above, it is this office's contention that if a health spa has not previously filed a security deposit it must initially file \$20,000 before it can be eligible for the \$5,000 reduction.

Two of the major statutory construction aids are found in Tex. Gov't Code, § 311.023 (1) and (6) (Vernon 1988).

In construing whether a statute is considered ambiguous on its face, a court may consider among other matters the:

The Honorable Dan Morales  
Page 3  
January 9, 1992

- (1) object sought to be attained;...[and]
- (6) administrative construction of the statute.

Further, as to the administrative construction, "the judiciary will adhere to an executive or departmental construction of an ambiguous statute unless it is clearly erroneous or unsound, or unless it will result in a serious hardship or injustice, though the court might otherwise have been inclined to place a different construction on the act." 67 Tex. Jur.3d Statutes § 155 (1989), citing cases.

The purpose stated for the Health Spa Act "is to safeguard the public against fraud, deceit, imposition, and financial hardship and to foster and encourage competition, fair dealing and prosperity in the field of health spa operations and services by prohibiting or restricting practices by which the public has been injured in connection with contracts for and the marketing of health spa services." Section 2, Texas Health Spa Act, cited above.

Additionally, Section 4 of the Act states:

Sec. 4. This Act shall be construed and applied to promote its underlying purposes as set forth in Section 2 of this Act and to provide efficient and economical procedures to secure the protection it provides.

In keeping with the spirit of Section 2 above, there must be some measure of money available to cover prepayments made by spa members for services promised but not yet delivered. It is evident that the legislature intended that there be financial protection for health spa members in those instances where a spa ceases business. The question is how large a security deposit is required.

I respectfully request your concurrence that there is no exemption to the security deposit requirement of section 10 of the Health Spa Act and that two classes, as delineated above, currently exist as to such deposit.

My staff and I are available to assist your office if you have any questions concerning this matter.

Sincerely,



John Hannah, Jr.  
Secretary of State

JH/gjj